

23 September 2019

Our ref: KS-IL

Committee Secretary
Senate Education and Employment Legislation Committee

By email: eec.sen@aph.gov.au

Dear Committee Secretary

**Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019
[provisions] – Answers to questions taken on notice**

Thank you for the opportunity to provide comments on the inquiry on the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019 [provisions]. The Queensland Law Society (QLS) appreciates the opportunity to appear at the hearing on 13 September 2019 and provide the following response to the question on notice.

On page 30 of the Hansard transcript, Senator Patrick said:

Senator PATRICK: *Are you suggesting that any criminal proceeding against a person might be better constrained by a custodial sentence or something? Is that what you're suggesting—that the bar is too low here?*

In our submission we raised concerns about the current drafting of proposed section 223 and in particular subsections (6)(d) and (e) where for the purposes of subsection (5), the 'fit and proper purpose test', a ground for disqualification is if:

- (d) *in any criminal or civil proceedings against the person, or in any action against the person by an agency of the Commonwealth or a State or Territory, the person is found to have engaged in conduct involving fraud, dishonesty, misrepresentation, concealment of material facts or a breach of duty;*
- (e) *in any criminal proceedings against the person, the person is found to have:*
 - (i) *engaged in conduct involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property; or*
 - (ii) *committed an offence against a law of the Commonwealth or a State or Territory that is punishable by imprisonment for 2 years or more.*

In respect of subsection (6)(d) our concerns are that a finding in a civil proceedings would include a tribunal finding – not necessarily a judicial finding – and that 'any action against the person by an agency of the Commonwealth or a State or Territory', could extend to a finding by a government agency made during the course of the agency performing regulatory functions. That is, it seeks to cover an extremely broad range of minor and more serious civil and criminal conduct.

In respect of subsection 6(e), our concerns relates to the first limb under 223(6)(e)(i). In a criminal trial the legal standard of proof is beyond reasonable doubt. This is a higher standard to the standard of 'balance of probabilities', with regard to the principle articulated in *Briginshaw v Briginshaw* (1938) 60 CLR 336, which is applicable in civil proceedings.

The Society's concern is that we can easily predict a situation where a person may be found not guilty of an offence where the prosecution has not discharged the legal standard of proof beyond reasonable doubt. However, in a civil proceeding for the type of conduct contemplated by 223(6)(e)(i), that is, 'involving the intentional use of violence towards another person, the intentional causing of...injury to another person or the intentional damaging or destruction of property', a court may be satisfied in civil proceedings on the balance of probabilities, against the defendant.

QLS is of the view that this test for disqualification from office should only be extended on a conviction for the most serious offences and that where an accused is found not guilty, that no action should be taken. In this regard we note that the Royal Commission report recommended that:

the definition of prescribed offence should be amended to include any offence under a law of the Commonwealth, State or Territory punishable on conviction by a maximum penalty of imprisonment for life or a period of 5 years or more. (page 228)

Currently, the meaning of **prescribed offence** under section 212 is subject to section 213 which relevant states that a person is not convicted of a prescribed offence (which includes '(d) any other offence under a law of the Commonwealth, a State or Territory, or another country, involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property', unless the person was sentenced to a term of imprisonment for the offence (section 213(c).

In our view, the proposed provision does not have sufficient regard for:

- the presumption of innocence; and
- the wide scope of proceedings which might be captured as it relates to the obligations and responsibilities of an officer carrying out their function within a registered organisation.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via _____ or by phone on _____

Yours faithfully

Bill Potts
President